

C. Congress intended to exclude many of the potential 4 GHz uses from auction.

The overbroad service class proposed for the 4 GHz band threatens to subject to the auction methodology services such as broadcast auxiliary, for which that methodology is wholly unsuited and was not intended. In creating the auction legislation, Congress declined to allow the auction of frequencies for undefined use or generally defined use.^{41/} It chose instead to narrowly confine the Commission's auction authority to particular types of services and to exempt from auction services like BAS. In reporting OBRA, the House Budget Committee stated:

The Committee's extensive record reveals that there are limited cases in which competitive bidding would be appropriate and in the public interest. The limited grant of authority contained in this section is designed so that only those classes of licenses would be issued utilizing a system of competitive bidding. The enactment of section 309(j) should not affect the manner in which the Commission issues licenses for virtually all private services,

^{40/} (...continued)

into decisions about spectrum allocation. The right to use a part of the radio spectrum exclusively is not always necessary. If the prospect of new revenue were to bias allocations toward exclusive use and away from open use when the latter produced greater social benefits, economic efficiency would not be served.

Congressional Budget Office, Congress of the U.S., Auctioning Radio Spectrum Licenses (1992) 21-22.

^{41/} See Letter from Congressman Edward J. Markey to Thomas Sugrue, Acting Ass't. Secretary for Communications and Information, Department of Commerce (Feb. 26, 1993).

including frequencies utilized by Public Safety Services [and] the Broadcast Auxiliary Service.^{42/}

If the Commission groups BAS operations with auctionable services and attempts to auction the disparate services together, it will have allowed the auction methodology to change fundamentally the manner in which it licenses BAS, contrary to the intent of the auction legislation. Or, it will de facto have excluded BAS from the GWCS band merely because BAS is ineligible for auctions.

The overbreadth of the GWCS classification presents yet another impediment to spectrum auctions. Consistent with its approach in limiting application of the auction methodology to a particular universe of services, OBRA also requires the Commission to tailor the auction methodology to the service being assigned. See 47 U.S.C. § 309(j)(3). "It is the Committee's intention that the Commission's methodology for any given service or class of license be based on the characteristics of the service itself, in order to promote the objectives and requirements of section 309(j)." H. Rep. 111, 103d Cong., 2d Sess. 255 (1993). With only the vaguest description of the services involved in a general fixed and

^{42/} H.R. Rep. 111, 103d Cong., 2d Sess. 253 (1993) (emphasis added). See also Committee on the Budget, S. Print 36, 103d Cong., 1st Sess. 65 (1993) ("Certain types of licenses are exempt from competitive bidding, including . . . licenses for terrestrial broadcasting"). BAS provides essential support for terrestrial broadcast television.

mobile service class, the Commission cannot tailor its auction methodology to the characteristics of the service.^{43/}

CONCLUSION

The determination of the First R & O to allocate the 4660-4685 MHz to a broad range of fixed and mobile uses and the associated preliminary decision to assign that band through competitive bidding are unlawful and, if implemented, will inhibit productive use of the spectrum. MSTV and the Joint Commenters urge reconsideration of this ill-advised approach, which marks an unfortunate departure from past allocation decisions. Congress intended to reallocate the NTIA spectrum to speed the delivery of emerging communications technologies. Perhaps no new technology offers so much to so many Americans as does BAS supported advanced digital television. Certainly no other information technology will provide free and universal access. Whereas other services may find a home elsewhere in the newly opened frequency bands, BAS users would look exclusively to the 4 GHz band for sufficient bandwidth to support digital video broadcasts. It therefore is imperative that the Commission capitalize on this chance to enhance free, over-the-air broadcast services by allocating the 4 GHz band for critical BAS operations.

^{43/} The auction statute also requires the Commission to prescribe service territories based on the characteristics of the proposed service. 42 U.S.C. § 309(j)(4)(c). The myriad uses included in the Report and Order's allocation of the 4 GHz spectrum will not allow the Commission to make this necessary determination of service territories.

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